F.M.S. REPORTS

[ORIGINAL CIVIL JURISDICTION.]

AITKEN, J.

November 27, 1937.

LOOI GUAN KWAY.....Plaintiff

v.

LOW LEAN BOK & 4 ORS.....Defendants

[IPOH CIVIL SUIT No. 39 of 1937.]

Practice—amendment of plaint—discretion of the Court how exercised.

On the 13th April, 1937 a plaintiff in person filed a confused and complicated plaint against 5 defendants. Appearances were entered by all the defendants. The appearance of the 4th defendant was struck out for irregularity and judgment was set aside, upon this defendant entering a proper appearance. By this time the plaintiff was represented by a Solicitor. The 3rd defendant was adjudged bankrupt on the petition of the plaintiff as the attorney of a third party. By the 10th August 1937 all the defendants had filed their statements of defence and the case found its way to the list shortly after that date. Dates were fixed for the hearing of the suit. Before the suit came on for trial, the plaintiff filed a motion for judgment against the 3rd defendant. The motion was ordered to stand over until the plaint was amended. In an application by the plaintiff to amend the plaint—

Held, that notwithstanding the latitude allowed by the Courts for amendments in civil suits, the proposed amendments could not be allowed, in that (1) though not inconsistent with the character of the suit, they sought to introduce several new causes of action (2) they would cause an injustice to several of the defendants and (3) the belated application was not made *bona fide*.

SUMMONS IN CHAMBERS.

Briggs for the Plaintiff (applicant).

AITKEN, J.—Unfortunately for himself the Plaintiff decided to be his own legal draftsman, and in that capacity he drew up the plaint in this action, which is in itself a lengthy document divided into 32 paragraphs, and to which is annexed a large bundle of other documents of varying degrees of relevancy and irrelevancy.

He took this plaint with its annexures to the Registry here, where it was admitted by the learned Assistant Registrar on the 13th of April last. Here again it was unfortunate that the learned Assistant Registrar did not consult me before he admitted this very verbose, confused and complicated plaint, because had he done so I should certainly have advised him to return it to the Plaintiff for substantial amendments to make it briefer and clearer.

After it had thus been admitted and filed, copies of it together with the usual form of Summons were served on all the five Defendants. Appearances were entered by or for all of them, but the appearance entered for the 4th Defendant was defective in that it gave an address for service outside the jurisdiction. The Plaintiff took advantage of this irregularity to apply, by Summons of the 1st of June last, to have the 4th Defendant's appearance struck out and judgment entered against him in default of appearance. When this Summons came before me on the 21st of June last, Plaintiff was represented by Mr. Farr, so that he was no longer acting without legal advice and assistance. The order I then made, striking out the 4th Defendant's appearance and entering judgment against him in default of appearance, was set aside in so far it purported to enter judgment against him, on the 1st of July last, by which date a proper appearance had been entered on behalf of the 4th Defendant.

About the same time as he was seeking to snatch a judgment in default against the 4th Defendant, the Plaintiff, as attorney of a lady named Ong Seoh Heong, was applying to have the 3rd Defendant adjudicated a bankrupt. In this application he was successful, and on the 25th of June last the 3rd Defendant was adjudicated a bankrupt. Against this adjudication the 3rd Defendant filed a notice of appeal, but as she failed to perfect her appeal within one month of the 25th of June last in accordance with the provisions of Section 20 of the Courts Enactment, it must be taken to have been abandoned. It should also be mentioned, I think, that in those bankruptcy proceedings Mr. Farr appeared for the petitioning creditor and Mr. Seenivasagam for the 3rd Defendant.

By the 10th of August last all the Defendants had filed their statements of defence, and this case seems to have found its way into the hearing list shortly after that date, and to have come before the learned Assistant Registrar on the fixing day of that month. I am told by Mr. Seenivasagam that the solicitors for the Plaintiff, and for the 1st, 2nd, 4th and 5th Defendants were all present on that fixing day; and though Mr. Farr tells me that he protested to the learned Assistant Registrar that the Plaintiff was not ready to go to trial, it is not disputed that the case was then and there fixed for hearing on the 30th of this month (November, 1937) and on the 1st, 2nd, and 9th days of next month (December, 1937).

I am further informed by Mr. Seenivasagam that on the 20th of August last he wrote to Mr. Farr as follows:—

"Dear Sir,

Civil Suit No. 39/37.

LOOI GUAN KWAY

v.

LOW LEAN BOK and ORS.

This case is fixed for hearing on the 30th November and the following days.

If it is desired by you to amend the plaint, will you please make your application to court early, as any application, unless promptly made, will be very strongly objected to by me, and under no circumstances will I consent to any application for postponement."

Mr. Seenivasagam complains that he has received no acknowledgment of or reply to this letter, and as Mr. Farr allowed both letter and complaint to pass without contradiction, I must assume that he received this letter although he did not answer it. I must also assume, I think, that he communicated its contents to the Plaintiff and took the latter's instructions thereon after tendering him a solicitor's advice. Whether the Plaintiff was willing to accept his solicitor's advice is, of course, quite another matter on which it would be useless for me to speculate; but outward and subsequent events appear to indicate that during the remainder of August and the whole of September last the plaint, in its original form, was thought to be good enough by the Plaintiff and his legal adviser.

The next date of importance is the 27th of September last, on which Mr. Farr filed a notice of motion praying that the statement of defence filed by the third Defendant in this suit should be struck out, and that judgment should be entered against her for the amount of the claim and for costs.

This notice of motion was supported by the following affidavit sworn by the Plaintiff on the 25th of September last:—

"I, Looi Guan Kway of full age and Chinese Nationality residing at Ipoh do hereby make oath and say as follows:—

1. I am the plaintiff above named.
2. The plaint and summons in the above suit was served on the defendant No. 3 on 15th day of April 1937 to which the said defendant No. 3 has filed a Memorandum of Appearance on 23rd April, 1937.
3. On the 26th day of May 1937 a statement of defence was filed by the said defendant No. 3 denying liability.
4. On the 25th June 1937 the said defendant No. 3 was adjudicated bankrupt and no notice of appeal was or is filed against the said adjudication order.
5. On the 19th July, 1937 my Solicitor wrote a letter to the Assistant Official Assignee (a copy of the said letter is attached hereto and marked "A") and in reply the Assistant Official Assignee wrote to my solicitor saying (inter alia) that he was not prepared to defend the action on behalf of the 3rd Defendant unless she found sureties to indemnify him against costs (a copy of the said letter is attached hereto and marked "B").
6. On the 9th August, 1937 the Assistant Official Assignee wrote to the 3rd defendant asking for an indemnity in the sum of $5,000 (a copy of the said letter is attached hereto and marked "C").
7. I am informed and verily believe it to be true that the 3rd defendant has not provided the indemnity demanded and that the Assistant Official Assignee is prepared to submit to judgment being given against the 3rd defendant for the amount of the claim and costs.

I pray for an order that the statement of defence filed by the said defendant No. 3 be struck off and judgment be entered against her for the amount of claim and costs in this suit."

It is unnecessary to set out the letters therein referred to, as their effects sufficiently appear from the affidavit itself.

When this motion came before me for hearing on the 1st of October last, in the presence of Mr. Farr for the Plaintiff and the Assistant Official Assignee in whom all the third Defendant's property had vested by reason of the bankruptcy adjudication of the 25th of June last, the position was much more serious than when it was sought to get a judgment against the 4th Defendant in default of a proper appearance on the 21st of June last. In the case of the 4th Defendant, every one concerned knew that the judgment would be set aside in a few weeks, and that nothing but a few costs was at stake. In the case of the 3rd Defendant, however, she was powerless to defend herself and the Assistant Official Assignee was in no position to incur any expense on her behalf. I therefore scrutinised the plaint far more carefully than I had done on the previous occasion, and decided that it did not sufficiently disclose any good cause of action against the 3rd Defendant in respect of the $177,608.73 for which judgment was claimed. In the result the motion was ordered to stand over generally until the plaint was amended, and in my notes of the proceedings it is recorded that "Mr. Farr admits that the plaint is not intelligible as drawn, and that it will have to be amended before trial."

From these facts which I have set out relative to the course of events subsequent to the filing of the plaint herein, it seems to me that the only inference I can draw is this:—that right up to the 1st of October last the Plaintiff and his legal adviser considered his plaint to be

good enough. In other words, it was not until their failure to get a default judgment against the 3rd Defendant on that date that they discovered the plaint was in need of amendment if the suit was to stand any appreciable chance of success.

In spite of that discovery, however, it was not until the 15th of this month that the Plaintiff fild a Summons for leave to amend his plaint, and the return date specified in the Summons is the 25th of this month, that is, only 5 days before the date fixed for the commencement of the trial.

It is also strange to find that in the interim period between the 1st of October last and the filing of this Summons, the Plaintiff was suing out subpeonas to ensure the attendance of his witnesses at the Court here on the date fixed for the commencement of the trial. When one considers the nature and extent of the amendments it is sought to make, and Mr. Briggs' admission that the plaintiff cannot go to trial on the plaint as originally drawn, I do not understand why steps were not taken to obtain a postponement of the trial pending the determination of the difficult questions raised by these proposed amendments. According to counsel for the Defendants the failure to take any such steps has compelled them to get up their clients cases for a trial to commence on the 30th of this month, and though I wish to guard myself against expressing any opinion on that contention now it is obvious, I think, that the failure to take such steps may lead to unnecessary trouble and expense.

I have now completed my examination of the facts leading up to the Plaintiff's application to amend the plaint in this suit, and we can pass on to consider the law. In my endeavours to ascertain that I have not only considered the numerous authorities cited to me by learned counsel, but I have also considered at least an equal number of different authorities to be found in the latest edition of *Sarkar's* Civil Procedure Code of India. From these I have emerged like a deep water diver gasping for breath, but reasonably hopeful that I have grasped some general principles.

From *the Australian Navigation &c., Co.* v. *Smith*, which is reported in 14 App. Cas. p. 318, I gather that their Lordships of the Privy Council are strong advocates for amendments in civil suits, whenever such amendments can be allowed without injustice to the other side; and it behoves me to follow in their Lordships' footsteps and take this general principle as my guiding star. Like all other general principles, however, it requires a certain amount of elucidation. For example, it is by no means always easy to decide whether a proposed amendment will, or will not, work an injustice to the other side; and so we have to discover some rather more precise though subsidiary principles to guide our footsteps.

My study of the authorities leads me to an attempt to state, or restate, three such principles. Thus in my opinion, amendments should always be allowed provided that—

1. There is *bona fides* on the part of the applicant;
2. They cause no prejudice to the other side which cannot be compensated by costs; and
3. They are not such as to turn a suit of one character into a suit of another and inconsistent character.

Applying the first of these subsidiary principles, if I may so describe them, to the facts and circumstances of this application, I have already indicated my view that the Plaintiff deliberately refrained from seeking liberty to amend until the failure of his attempt to get judgment by default against the 3rd Defendant, on the 1st of October last, made it clear to him that, without amendment, he had little or no chance of obtaining the relief he desired. It seems to me that such conduct amounts to something more than carelessness, or negligence, or mistake—he was in receipt of legal advice from the 21st of June last onwards, and the only inference that I can draw therefrom is that the Plaintiff's belated application to amend is solely due to the events of the 1st of October last, and is not made *bona fide*: See in this connection the case of *Maung Than Daing* v. *U Thee and another*, which is reported at page 600 of "Indian Cases" Vol. VIII.

This inference is certainly not weakened by a consideration of the nature and extent of the amendments it is proposed to make to the original plaint which, though possibly not inconsistent with the character of the suit, certainly seek to introduce several new causes of action and to multiply old accusations of fraud. To hark back to their Privy Council Lordships' strong advocacy of amendments, it seems to me that, in all the circumstances of this case, I could not allow the proposed amendments without inflicting on several of the Defendants an injustice which could not be compensated by any order as to costs. I therefore feel compelled to dismiss this application with costs.

Application dismissed with costs.